Supreme Court, U.S.
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No. 99-934

In The

Supreme Court of the United States

HUGH CHALMERS MOTORS, INC.,

Petitioner,

vs.

GULF STATES TOYOTA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Gulf States Toyota, Inc. is a private, family-owned corporation. It has no parent company and none of its shares of corporate stock are owned by publically traded companies.

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CONSTITUTIONAL AND STATUTORY ISSUES INVOLVED

Petitioner erroneously suggests that this case involves constitutional issues. Although Petitioner states that the Commerce Clause of the United States Constitution, Article I, § 8, is involved in this case, none of the questions presented by Petitioner or its argument even mention or refer to the Commerce Clause. Neither are there substantial issues raised about the Sherman Act, 15 U.S.C. § 1 or the Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221 *et seq.*, as all issues raised by Petitioner are procedural in nature.

STATEMENT OF THE CASE

The petition for writ of certiorari (the "petition") filed on behalf of Hugh Chalmers Motors, Inc. ("Chalmers") presents a picture vastly different than that presented to the district court and Court of Appeals for the Eighth Circuit. Chalmers now seeks a review of claims against Gulf States Toyota, Inc. ("GST") alone, whereas below Chalmers made no distinction between GST and Toyota Motor Sales, U.S.A., Inc. ("TMS"). Some background is necessary to place this shift of position in proper perspective.

TMS is the importer and distributor of Toyota products in the continental United States. Under TMS's distribution system, the continental United States is divided into twelve multi-state distribution regions. GST is a privately owned and independently managed exclusive

regional distributor of Toyota products for Texas, Oklahoma, Arkansas, Mississippi and Louisiana. The Chalmers dealership, located in West Memphis, Arkansas, and operating pursuant to a dealer agreement with GST, was at the eastern boundary of GST's distribution area. Toyota dealers located across the Mississippi River in Memphis, Tennessee, were supplied vehicles by Toyota Motor Distributors, Inc., a wholly-owned subsidiary of TMS, which is the regional distributor for Tennessee and other surrounding states, known as the "Cincinnati Region."

From the beginning of this controversy – first with the complaint filed in Arkansas state court and later in its federal court complaint – the Chalmers dealership complained about an alleged disparity in pricing to its dealership and to the Toyota dealerships in Memphis which were supplied by the Cincinnati Region. Although the theories and claims varied from time to time, Chalmers consistently alleged that TMS and GST conspired to effect this result. In fact, the complaints filed by Chalmers – both in state court and federal court – consistently referred to both defendants jointly and indistinguishably as "Defendants."

Chalmers' shift in position to assert claims against GST alone has given rise to confusion and distortion of the procedural background and events that occurred below. The petition contains outright misstatements and implications that are contrary to fact. One misleading tactic employed by Chalmers is the attachment to the petition and reliance on appendices that are carefully excerpted to mask their true character and highlight contentions now leveled against GST alone. *See* Excerpts

from Chalmers' Motion and Brief, Appendix E[1] (hereinafter abbreviated "App. ___") at 36a-40a; Affidavit of Peter Nikolakakis, App. F at 41a-45a; Supplemental Affidavit of Hugh B. Chalmers, App. G at 46a-48a; and the Complaint, App. H at 49a-55a. Notwithstanding this approach, the true character of Chalmers' claims asserted below can be gleaned from the Memorandum Opinion and Order of the district court (App. C at 10a-34a) and the Opinion of the Eighth Circuit (App. A at 1a-5a).

In order to correct the many misstatements and false implications contained in the petition, it is necessary to review the procedural history of this case, including the prior Arkansas state court litigation regarding the same activities, the proceedings in district court – particularly the post-judgment activities in which new arguments and theories were raised – as well as the rulings of the Eighth Circuit. Once an accurate description of those events is presented, reasons for denying the writ become readily apparent.

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[1] As an example of the use of an excerpt masking the true character of a pleading, Appendix E is entitled "Excerpts From Chalmers' Motion and Brief." App. E at 36a. The excerpt is taken from two separate pleadings entitled "Motion to Alter Judgment Under Rule 59(e) or to Set Aside Judgment Under Rule 60(b)" and "Memorandum of Authorities in Support of Motion to Alter Judgment Under Rule 59(e) or to Set Aside Judgment Under Rule 60(b)." One might question why the excerpt does not clearly disclose that these were post-judgment pleadings.

A. The Petition Misstates the Background, Claims Asserted and the Disposition of the Prior Arkansas State Court Case.

On August 27, 1993, Hugh Chalmers, Sr., Hugh Chalmers, Jr. and Hugh Chalmers Chevrolet-Cadillac-Toyota, Inc. sued TMS, GST and a GST employee in Arkansas state court alleging breach of contract, breach of an implied covenant of good faith and fair dealing, fraud, interference with contract, and violation of the price discrimination provisions of the Arkansas Unfair Practices Act. *See Chalmers v. Toyota Motor Sales, U.S.A., Inc.*, 326 Ark. 895, 935 S.W. 2d 258, 260 (1996).

The state court defendants removed the case to federal court on the basis that plaintiffs' price discrimination allegations necessarily involved federal question jurisdiction under the Robinson-Patman Act. Plaintiffs moved to remand stating that they had not pleaded, and did not want to plead, a federal cause of action. The district court held that the case should be remanded because plaintiffs had specifically pled state causes of action and had not specifically pleaded a federal claim. In so holding, the district court noted the deficiencies that plaintiffs would likely have in proving their price discrimination claim under the Arkansas Unfair Practices Act because the act applied only to intrastate pricing while plaintiffs' complaint was based on interstate pricing.

On December 28, 1993, the defendants moved for partial judgment on the pleadings as to plaintiffs' cause of action for price discrimination under § 207 of the Arkansas Unfair Practices Act. On September 29, 1994, the state court dismissed plaintiffs' price discrimination

claim because § 4-75-207 applied only to *intra*state price discrimination, whereas plaintiffs alleged *inter*state price discrimination. Plaintiffs then amended their complaint on November 7, 1994, adding claims under the Arkansas Franchise Practices Act. *Id.*, 935 S.W.2d at 260.

Following extensive discovery, defendants moved for summary judgment raising several grounds on each state cause of action, including the statute of limitations. Finding no dispute of material facts, the state court granted summary judgment as to all defendants on that ground. *Id.* The Arkansas Supreme Court affirmed and denied rehearing. *Id.*[2]

B. The Petition Misstates the Proceedings in the District Court.

On April 23, 1997, Chalmers filed suit against TMS and GST in United States District Court for the Eastern District of Arkansas alleging federal antitrust and Automobile Dealers' Day in Court Act ("ADDICA") claims arising out of the operation of the Chalmers Toyota dealership. On July 15, 1997, TMS and GST filed separate motions to dismiss or in the alternative, for summary judgment as to Chalmers' claims. The motions raised several grounds for dismissal of each cause of action, including statute of limitations, *res judicata* and failure to

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[2] Summary judgment was granted and affirmed on statute of limitations grounds as to all claims asserted in the state court action, not just the fraud claim as stated in the petition. *See* Petition at 2.

state an actionable claim. Those motions were fully briefed by the parties.

On October 30, 1997, the district court issued an order indicating that it would treat the pending motions as motions for summary judgment because it would rely on evidence outside the pleadings. In its order, the district court provided the parties ten days to file additional materials in support of or in opposition to the pending motions. Chalmers filed a memorandum containing additional argument. TMS and GST made no additional filing.

On January 21, 1998, the district court filed a Memorandum Opinion and Order granting TMS' and GST's motions for summary judgment, ruling that Chalmers failed to put forward any evidence of its claims of a TMS/GST antitrust conspiracy, that the antitrust claims were barred by the statute of limitations, and finally that the ADDICA claims were time-barred and *res judicata*.

The most egregious misstatement regarding proceedings in the district court is the persistent suggestion and implication that Chalmers raised the distributor-dealer conspiracy theory and argument based on *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (hereinafter *"Perma Life"*), in district court before entry of summary judgment. For instance, the petition alleges that the district court dismissed, finding no conspiracy between defendants, "despite Chalmers' citation to the district court of the case of *Perma-Life*. . . . " Petition at 3. Further, the petition alleges that the district court dismissed the complaint "despite Chalmers' timely proffer of the alternative antitrust theory that allows the relationship between a seller (defendant) and buyer (plaintiff) in

a tying case to satisfy the conspiracy or combination requirements of the antitrust statute pursuant to *Perma-Life*." Petition at 6. Still further, the petition suggests that the theory of a combination between GST and Chalmers was repeatedly stated during "the other pre-trial proceedings established by the rules" by motion, brief and affidavit. Petition at 8. These statements and implications are misleading and false. Chalmers did not raise this argument until *after* the entry of summary judgment against it.

On February 2, 1998, Chalmers filed a motion to alter or to set aside the judgment. Attached as exhibits to the motion were a supplemental affidavit of Hugh B. Chalmers and an affidavit of Peter Nikolakakis.[3] It was in this Rule 59(e) post-judgment motion that Chalmers raised for the first time the argument of distributor (seller)-dealer (buyer) conspiracy and the *Perma Life* case. On July 28, 1998, the district court denied Chalmers' motion holding that the evidence submitted with the motion could not fairly be said to be "new" evidence and that even if the evidence were considered, TMS and GST were still entitled to summary judgment.

It should also be noted that at no time in the district court – either before or after entry of summary judgment

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[3] Peter Nikolakakis, although unnamed, was referred to in the petition as "GST's sales manager [who] testified by affidavit. . . . " Petition at 5. At the time of the post-judgment filing of that affidavit, Nikolakakis had been terminated from his position as a district sales manager and was a disgruntled former employee who subsequently sued GST in Arkansas state court, represented by the same attorney as Chalmers. That suit was subsequently dismissed.

– did Chalmers move for leave to amend its complaint or otherwise suggest to the district court that it desired to amend its complaint.

C. The Petition Misstates and Misconstrues the Rulings of the Court of Appeals.

Notwithstanding Chalmers' representation to this Court that its appeal to the Eighth Circuit pursued individual claims of liability (Petition at 6), the primary thrust of the appeal was a continued assertion of a conspiracy between TMS and GST. Moreover, the petition flatly misstates the ruling of the Eighth Circuit by suggesting that the Court of Appeals overruled the district court's conspiracy ruling and found that Chalmers had alleged facts that would have supported an antitrust claim against GST alone. Petition at 6.

First, the Eighth Circuit actually agreed with the district court that there was insufficient proof of conspiracy:

> Each antitrust count in the complaint alleges an unlawful combination and conspiracy between defendants. However, the record presents no genuine issue of material fact establishing such combination or conspiracy. *See* Memorandum and Opinion, at 11 (finding, in analyzing question of whether continuing conspiracy exception to statute of limitations applied, that no conspiracy existed between TMS and GST). Rather, appellant merely asserted that there is strong evidence that defendants conspired with one another. Such conclusory allegations are insufficient to avoid summary judgment. . . . We thus

> affirm the grant of summary judgment as to the antitrust claims.

Eighth Circuit opinion, App. A at 3a (citations omitted).

Second, Chalmers conveniently and frequently ignores the language contained in footnote 1 of the Eighth Circuit's opinion that the allegations "may have" supported a claim against GST alone, not that they "would have" supported a claim (Petition at 6), or that they "supported an antitrust claim" against GST alone (Petition at 7), or that they "warrant a claim against GST" (Petition at 19). Certainly, there was no holding that an antitrust combination or conspiracy existed as a matter of law, as is suggested by the wording of the initial question presented by the petition. Petition at *i*.

In discussing the Eighth Circuit's affirmance of summary judgment on Chalmers' ADDICA claim, the petition states that the Eighth Circuit "apparently agreed that *res judicata* did not apply . . . ". Petition at 25.[4] This is an incredible statement in light of the Eighth Circuit's plain and unequivocable ruling on this point:

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[4] Although the petition earlier asserts that in order to avoid the *res judicata* defense to the ADDICA claim, the complaint was limited to actions committed by GST after the state lawsuit was filed (Petition at 2), this position is belied by a reading of the complaint itself. Nowhere within the body of Count 5 of the complaint, which alleges the ADDICA claim, is there a limitation of the time period for which damages are sought. Complaint ¶¶58-59. Moreover, the complaint contains an affirmative allegation that the doctrine of *res judicata* does not bar the claims because "the causes of action brought herein involve *exclusive* federal court jurisdiction. . . . " Complaint ¶64.

> As an initial matter, we agree with the district court that the ADDICA claim is barred by the claim-preclusion effect of the earlier state court judgment. Appellant knew of the facts underlying his claim at the time it instituted state court action in 1993, and there is no authority for the proposition that federal district court is the exclusive forum for bringing ADDICA claims. . . .

Eighth Circuit opinion, App. at 4a ((citations omitted).

Chalmers completely ignores the primary ruling of the Eighth Circuit affirming the district court's summary judgment on the ADDICA claim, and instead focuses on what the Eighth Circuit apparently intended to be an alternative ground for supporting the same result. Although Chalmers complains that the Eighth Circuit made no acknowledgment of the substantive case law and authority on ADDICA (Petition at 26), the *res judicata* ruling makes such an analysis unnecessary.[5]

D. The Petition Contains Misstatements That are Not Supported by the Record or Relevant to this Appeal, Apparently in Hopes of Injecting Prejudice and Bias into the Record.

The petition blithely accuses GSST and a separate, privately-owned regional distributor of Toyota vehicles – Southeast Toyota – of implementing programs to require dealers to purchase unwanted port-installed options in

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[5] Contrary to the statement in the petition at 26, there is no stipulation between the parties as to the binding authority under the ADDICA claim.

the mid-1980's and further suggests that Southeast Toyota discontinued that practice as a result of lawsuits while GST has not. Petition at 1. The petition also asserts that there is no factual dispute regarding the existence of the tying arrangements imposed on Chalmers by GST. Petition at 5.

GST strongly disputes the existence of any tying arrangement. However, because summary judgment was sought below on grounds of statute of limitations, absence of a conspiracy, and lack of market power, there was no factual development of GST's position on the alleged tying arrangement – it was simply not an issue that was necessary to the motion for summary judgment. This issue remains strongly disputed.

Insofar as the allegations about the conduct of Southeast Toyota are concerned, those allegations are neither accurate nor supported by the record in this case. More importantly, whatever the conduct of Southeast Toyota may have been, it is totally irrelevant to the issues in this case and the claims Chalmers now attempts to pursue against GST.

REASONS FOR DENYING THE WRIT

A. The Eighth Circuit's Disposition of the Case is Consistent with this Court's Modern Summary Judgment Practice.

The petition suggests that the issue presented in this case is whether alternative theories of recovery in antitrust cases will be allowed by motion, filed after the filing

of the complaint, if a trial on the merits would otherwise be denied. Petition at 5. In addressing this issue, Chalmers suggests that it *timely* proffered an alternative antitrust theory that allows the relationship between seller and buyer in a tying case to satisfy the combination or conspiracy requirement of the antitrust laws pursuant to *Perma Life*. Petition at 6. The fundamental flaw in Chalmers' position is that the *Perma Life* theory of combination or conspiracy was not timely presented.

Although the petition confuses and attempts to obfuscate the timing of various events in the district court, it is indisputable that Chalmers raised the *Perma Life* argument for the first time after the entry of summary judgment against it in a Rule 59(e) motion to alter or to set aside the judgment.[6] It is well settled, however, that new arguments or legal theories cannot be raised for the first time in a Rule 59(e) motion to alter or amend filed after summary judgment has already been granted. *FDIC v. World Univ., Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) ("Rule 59(e) motions are 'aimed at reconsideration, not initial consideration.' Thus, parties should not use them to 'raise arguments, which could, and should, have been

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[6] The sequence of events is reflected by the Appendices to the petition. The district court's memorandum opinion and order granting summary judgment was entered January 21, 1998. App. C at 10a-34a. Chalmers' Rule 59(e) motion and brief presenting the *Perma Life* argument was filed on February 2, 1998 as were the accompanying affidavit of Peter Nikolakakis and supplemental affidavit of Hugh B. Chalmers. *See* App. E at 36a-40a, (note that the excerpts from Chalmers' motion and brief do not disclose that it is a Rule 59(e) motion to alter the judgment), App. F at 41a-45a, and App. G at 46a-48a.

made before the judgment issued.' . . . They may not be used to argue a new legal theory.") (citations omitted); *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir. 1988) (Rule 59(e) motions "cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the summary judgment motion. . . . Nor should a motion for reconsideration serve as an occasion to tender new legal theories for the first time.") (quoting *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987)); *FDIC v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (Motion to alter or amend the judgment, filed after summary judgment entered, "cannot be used to raise arguments which could, and should, have been made before the judgment issued" or "to argue a case under a new legal theory.")

These rulings are consistent with this Court's modern summary judgment holdings that require a party against whom a motion for summary judgment has been filed, to come forward with proof rather than resting on the allegations of the complaint. Thus, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986), this Court wrote:

> In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), we affirmed a grant of summary judgment for an antitrust defendant when the issue was whether there was a genuine factual dispute as to the existence of a conspiracy. We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial." We observed further that "[i]t is true that the issue of material

> fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting a claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." 391 U.S. at 288-289.
>
> We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get a jury without "any significant probative evidence tending to support the complaint." *Id.* at 290.

See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The policy evidenced by *Anderson*, *Celotex* and their progeny is consistent with the result reached in this case by the Eighth Circuit. When faced with a properly supported motion for summary judgment, Chalmers was obligated to come forward with proof, arguments and legal theories to avoid imposition of the summary judgment. It did not do so, and it cannot attempt to cure those deficiencies through a Rule 59(e) motion to alter or to set aside the judgment after summary judgment has been entered.

B. The Eighth Circuit Opinion Does Not Conflict With Any Opinion of this Court or of Another Circuit.

The petition argues that the Eighth Circuit's decision is inconsistent with this Court's holding in *Foman v. Davis*, 371 U.S. 178 (1962), and numerous decisions of other courts of appeal. Petition at 20-24. The petition also

argues that the Eighth Circuit's opinion renders a different outcome than this Court's decision in *Perma Life*. An analysis of the cases relied on by Chalmers, however, reveals that the Eighth Circuit opinion does not conflict with any substantive rule of law contained in any opinion of this Court or any court of appeals.

1. *Foman v. Davis*

GST does not dispute that in *Foman v. Davis*, this Court admonished that the mandate of Rule 15(a) – that leave to amend "shall be freely given when justice so requires" – is to be heeded. 371 U.S. at 182. Although *Foman v. Davis* is distinguishable because it involved a motion for leave to amend filed after a dismissal for failure to state a claim, while this case involves a summary judgment, Chalmers faces an even larger hurdle: Chalmers *never* filed a Rule 15(a) motion for leave to amend in the district court.

Chalmers' attempts to sidestep this fatal flaw initially by obfuscating the procedural history of this case in district court and then by two more direct, although inconsistent, ways. Chalmers asserts that leave to amend was requested by paragraph 65 of the complaint. Petition at 17, 24. That paragraph of the complaint, however, is nothing more than a boiler plate attempted reservation of a right to amend – it does not constitute a motion for leave to amend as envisioned by Rule 15(a).

Chalmers also asserts that it would have been futile to seek amendment in the district court because the district judge refused to recognize *Perma Life*. Petition at 18-19. This argument ignores the fact that Chalmers did

not present its *Perma Life* argument to the district court until after summary judgment was entered. The argument is further belied by the fact that Chalmers did not request leave to amend or suggest that amendment should be given in its briefs or argument to the Eighth Circuit. Only after the entry of the Eighth Circuit's opinion affirming summary judgment did Chalmers suggest – through a petition for rehearing and petition for rehearing en banc – that an amendment should be granted. One might question why Chalmers contends that the Eighth Circuit should have invited it to amend (Petition at 17) when Chalmers itself had never before sought or suggested an amendment.

2. *Perma Life*[7]

Perma Life is, of course, an important case because it declared that the doctrine of *in pari delicto* is not available as a defense in private antitrust actions. 392 U.S. at 138-141. This case, however, does not involve the doctrine of *in pari delicto*.

In *Perma Life*, the district court had entered summary judgment in favor of defendants (respondents in this Court) with respect to all claims, although the Court's opinion does not disclose the grounds relied on by the district court. *Id.* at 135-136. The court of appeals reversed

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[7] The petition incorrectly states that GST has never attempted to distinguish *Perma Life* in any of its prior briefing. Petition at 24. Chalmers apparently overlooks the fact that GST's Brief of Appellee in the Eighth Circuit noted Chalmers' misapplication of *Perma Life* and adopted the argument of TMS's Brief of Appellee at 22-24. *See* GST's Brief of Appellee at 7.

the judgment on a Robinson-Patman claim but affirmed the district court's ruling on the other antitrust claims on two grounds: (1) plaintiffs' claims were barred by the doctrine of *in pari delicto*, and (2) the two corporate defendants – Midas and International – while functioning as separate corporations, had common ownership and, therefore, could cooperate without creating an illegal conspiracy. *Id.* at 136. Having declared the doctrine of *in pari delicto* unavailable as a defense in a private antitrust action, the Court then turned to the alternative "no conspiracy" ruling of the court of appeals.

The Court first held that because respondents – Midas and International – availed themselves of the privilege of doing business through separate corporations, the fact of common ownership would not insulate them from forming a combination or conspiracy. *Id.* at 141-142. The Court then noted that in any event each petitioner could charge a combination between Midas and himself as of the time he unwillingly complied with the restrictive franchise agreement. *Id.* at 142. Although the *Perma Life* opinion does not disclose the content of the plaintiff's complaint, the respondents apparently argued that neither theory of conspiracy was alleged with sufficient particularity in the complaint. Apparently because the case was to be remanded in any event, the Court found that respondents would be in no way prejudiced if petitioners were permitted to rely on these alternative theories of conspiracy.

In this case, pursuant to the Eighth Circuit opinion, the case was not to be remanded to the district court on any conspiracy theory, much less alternative theories. Moreover, permitting a plaintiff to rely on alternative

theories of conspiracy is vastly different than permitting a plaintiff to rely on a new theory or argument raised for the first time after summary judgment has been entered. The latter would clearly undermine the summary judgment procedure embodied in this Court's decisions in *Anderson* and *Celotex* discussed at pages 13-14, *supra*.

To the extent that Chalmers asks the question why it should receive different treatment than the petitioner in *Perma Life*, there are several answers. First, *Perma Life* involved the important issue of whether the doctrine of *in pari delicto* could be used as a defense in private antitrust cases and reversal and remand of the case was significant to that aspect of the Court's ruling. Second, since *Perma Life*, there have been changes in both substantive and procedural aspects of the law. The Court's ruling in *Perma Life* that separate corporate entities under common control can form an antitrust combination or conspiracy would be decided differently today. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Likewise, the procedural law on summary judgment has changed as reflected by this Court's rulings in *Anderson* and *Celotex*. Given these distinctions, the Eighth Circuit's opinion cannot be said to be in conflict with any significant or viable holding of *Perma Life*.

3. Other Courts of Appeals

Although Chalmers argues that conflicts exist between various circuit courts or within the same court of appeals, its complaint is really directed at the application of a properly and consistently stated principle of law to the facts of its case. Chalmers cites no opinion from

another court of appeals with which the Eighth Circuit's opinion allegedly conflicts. Moreover, a conflict within the same court of appeals is not normally a basis for granting a petition for writ of certiorari. *See* SUP. CT. R. 10(a) (One basis for review is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *see also* ROBERT L. STERN, SUPREME COURT PRACTICE § 46 (7th ed. 1993); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (recognizing that "[i]t is primarily the task of the Court of Appeals to reconcile" conflicting decisions between two different panels.)

Indeed, no such conflict really exists in the cases cited in the petition. By way of example, although the petition suggests that the Seventh Circuit has, in effect, established a "double standard" for testing the sufficiency of pleadings, the cases cited do not support that position. The petition cites *Goren v. New Vision International, Inc.*, 156 F.3d 721 (7th Cir. 1998) as involving a more liberal pleading standard and suggests that *Transamerica Financial Services, Inc. v. Sykes*, 171 F.3d 553 (7th Cir. 1999) reflects a conflicting, more stringent standard.

Goren involved a motion to dismiss a RICO complaint for failure to plead fraud with specificity and for failure to state a claim pursuant to Rule 12(b)(6). 156 F.3d at 725. In that context, the Seventh Circuit suggested by footnote that where the plaintiffs alleged the violation of a statutory provision, the court should review the subsections of that statute to determine whether a claim is stated. *Id.* at 730 n.8. The Seventh Circuit went on to affirm the dismissal of the trial court. *Id.* at 733. On the other hand,

Transamerica Financial Services involved a motion for summary judgment granted in favor of the defendants by the district court. 171 F.3d at 554. On appeal, the plaintiffs sought reversal, in part, based on a different subsection of the statute than that argued to the district court. In that context, the Seventh Circuit stated:

> While a complainant need not specify her theory of liability in a complaint, neither must a court search the United States Code for provisions which might be relevant to a plaintiff's case. "It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal."

171 F.3d at 555 (citations omitted).

In short, these Seventh Circuit cases simply involve different standards applicable to motions to dismiss under Rule 12(b)(6) and motions for summary judgment. Application of the summary judgment standard is consistent with the result reached in the present case.

C. The Petition Advances No Reason Why the ADDICA Ruling of the Eighth Circuit Should Be Reviewed.

As previously noted, the petition completely ignores the primary ruling of the Eighth Circuit that Chalmers' ADDICA claim is barred by the doctrine of *res judicata*. *See* pages 9-10, *supra*. The petition cites no opinion of this Court or any court of appeals with which this ruling is alleged to be in conflict. Accordingly, there is no reason

advanced that would justify this Court's review of the Eighth Circuit's ruling on Chalmer's ADDICA claim.

CONCLUSION

The Eighth Circuit's disposition of this case is consistent with this Court's modern summary judgment practice. The petition for writ of certiorari largely ignores the critical fact that the primary argument advanced here regarding the *Perma Life* conspiracy theory was raised for the first time after entry of summary judgment. Moreover, even though the petition urges that Chalmers should be permitted to amend, no motion for leave to amend was filed with the district court or even suggested to the district court or Eighth Circuit until after the summary judgment was affirmed. In short, the Eighth Circuit decision does not conflict with any important rule of law in any opinion of this Court or of any court of appeals. The petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

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